UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 32

STERICYCLE, INC.

and

Cases 32-CA-24230 32-CA-24326

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AUTO TRUCK DRIVERS, LINE DRIVERS, CAR HAULERS, AND HELPERS, LOCAL NO. 70 OF ALAMEDA COUNTY, CALIFORNIA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA

GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE CONSOLIDATED COMPLAINT

Respondent has filed with the Board a Motion to Dismiss the Consolidated Complaint, herein referred to as the Motion, claiming therein that the Consolidated Complaint should be dismissed due to lack of competent supporting evidence, lack of supporting case law, and lack of due process during the investigation. For the reasons that follow, Respondent's Motion should be dismissed.

Summary

Contrary to Respondent's assertions, the evidence obtained by the Region during the investigation of the charges, including the affidavit testimony of both parties' witnesses and the documents submitted by both parties, supports the violations of the Act alleged in the Consolidated Complaint. Moreover, despite Respondent's contention that it was denied due process during the investigation when the Region did not provide it with the Charging Party's Confidential Witness Affidavits, it is well-established under

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Section 102.118 of the Board's Rules and Regulations, as well as case law, including the Supreme Court's ruling in *Jencks v. United States*, 353 U.S. 657, 77 S.Ct. 1007 (1957), that Respondent has no due process claim to Confidential Witness Affidavits prior to the hearing.

As Respondent acknowledges in its Motion, the Region dismissed most of the charge allegations filed against Respondent by Teamsters Local 70, the charging party Union. The Region's decision not to issue a complaint on many of the allegations brought against Respondent demonstrates that the allegations of the charges were thoroughly investigated and impartially decided based upon the totality of the evidence submitted by both parties. Moreover, the adequacy of the Region's investigation is tested, "not by an investigation of the investigation, but by the General Counsel's ability in an open hearing to demonstrate by a preponderance of the credible evidence that the respondent has engaged in the unfair labor practices alleged in the complaint." *Redway Carriers*, 274 NLRB 1359, 1371 (1985). Respondent's claim regarding the adequacy of the investigation is no basis for dismissing the Consolidated Complaint. *Id.* Rather, the proper forum for Respondent's arguments that the facts and law do not support the allegations of the Consolidated Complaint is a hearing before an administrative law judge.

Respondent Delayed Performing Employee Evaluations

The evidence obtained by the Region during the investigation of the charge, including the testimony and documents provided by both parties, supports the allegation that Respondent delayed giving evaluations because of employees' Union activities, in violation of Section 8(a)(3) of the Act. Respondent was fully apprised of the allegation

during the investigation and was asked to respond. As Respondent acknowledges in its Motion, it submitted copies of employee evaluations in response to the allegation; however, contrary to what Respondent contends in its Motion, the evaluation forms, which range in date from 2004 to 2009, do not show that Respondent gave the evaluations on schedule in 2009.

Respondent offered a total of six employee evaluation forms from a bargaining unit of 36 employees, with no supporting evidence regarding whether this small sample represented the extent of the employee evaluations which were due by the time of the investigation. Although Respondent claimed during the investigation, and claims now in its Motion, that it gave the annual evaluations on schedule at the time of employees' anniversaries with Respondent, Respondent failed to submit evidence of any employees' dates of hire, thus failing to demonstrate that any of the evaluations coincided with employees' anniversaries. Moreover, witness testimony obtained during the investigation supports the allegation that Respondent did not give the evaluations on time. Thus, there is a factual dispute about the evaluations that should be resolved by an administrative law judge, as the finder of fact, based upon the evidence properly introduced at a hearing.

Respondent Ceased Paying Periodic Wage Increases

The evidence obtained by the Region during the investigation supports the allegation that Respondent violated Section 8(a)(3) of the Act by ceasing to pay periodic wage increases because its employees elected the Union to represent them for purposes of collective bargaining. There is no factual dispute that Respondent ceased paying periodic wage increases after the employees elected the Union as their collective-bargaining

representative in a Board election which took place on January 16, 2009. Thus, Respondent concedes at page seven of its Motion that it declined to grant the wage increases after the Union was elected. There remains a factual dispute regarding Respondent's motive in declining to grant these increases, which should be submitted to an administrative law judge for resolution based upon the evidence properly introduced at a hearing.

In an effort to explain the basis for, and attempt to settle, the allegation regarding Respondent's failure to pay the wage increases, the Region provided Respondent's attorney with relevant case citations, including *Holland American Wafer Co.*, 260 NLRB 267 (1982) and *United Rentals*, 349 NLRB 853 (2007). The evidence submitted by both parties during the investigation regarding the factors considered by the Board in *Holland American Wafer Co.*, supra, and *United Rentals*, supra, such as the regularity and timing of the wage increases, the amount of the wages increases, and the extent of discretion involved, supports the allegation that Respondent violated Section 8(a)(3) of the Act by ceasing to grant periodic wage increases. In this regard, employees regularly received pay increases on their anniversary date, the increases ranged between one and five percent, and the increases were based on standardized performance reviews that ranked employees' performance in 12 fixed categories.

Moreover, Respondent's focus on the amount of discretion involved in Respondent's wage increases fails to address the fact that the Consolidated Complaint in this case alleges a Section 8(a)(3) violation. Thus, regardless of whether employees expect to receive a raise *every year*, which the evidence shows that they do, Respondent

¹ The ballots were counted on February 3, 2009, after the Board denied Respondent's Request for Review of the Region's unit determination. The result was 23 votes in favor of Union representation and 12 votes against, out of 36 eligible voters.

made it clear to employees that they would have received a raise *this year*, but for the Union, and informed employees that they would not receive increases this year because they elected the Union.

Although Respondent argues that "the Board's confusing and checkerboard history of approving or disapproving wage increases" justifies dismissal of the allegation, Respondent has misread the case law applicable to the alleged violation.² In Holland American Wafer Co., as Respondent concedes in its Motion, the Board found it "unnecessary to determine whether Respondent's unilateral withholding of . . . wage increases violated Section 8(a)(5) of the Act." Holland American Wafer Co., 260 NLRB 267 at 267. It was unnecessary for the Board to decide the Section 8(a)(5) allegation precisely because the Board found that the employer's "conduct related to and concurrent with the denial of the wage increases violates Section 8(a)(3) and (1);" therefore, the remedy for the Section 8(a)(3) violation provided appropriate relief to the discriminatees. Id. Respondent fails to acknowledge that, although the Board found it unnecessary to decide the Section 8(a)(5) allegation, the Board expressly affirmed the Section (a)(3) violation. Here, like the violation affirmed by the Board in Holland American Wafer Co., supra, the Consolidated Complaint alleges a Section 8(a)(3) violation, and the Region maintains its position that Board law supports the alleged violation. In any event, the appropriate forum for Respondent's legal argument is in a brief to the administrative law judge based upon evidence properly introduced and received at a hearing.

² Respondent's Motion, page 7, fn. 1.

Respondent's New Enforcement of Reporting Times Was Due to Employees' Union Activities and Was Motivated by Union Animus

The evidence collected from both parties during the investigation supports the allegation that Respondent began enforcing reporting times because of the employees' Union activities, not because Respondent found itself non-compliant with wage and hour laws. Respondent acknowledges in its Motion that it made a "modest change" to begin enforcing reporting times as "a direct result of the Union-funded lawsuit." The Region considered this asserted defense during the investigation of the charge; however, Respondent failed to present evidence sufficient to overcome the prima facie case that it began enforcing reporting times because of employees' Union activities. Among other things, Respondent's claim that its action was motivated by the lawsuit conflicts with witness testimony regarding what supervisors told them was the reason for the change.³

The mere fact that a wage and hour lawsuit has been brought against Respondent does not inherently lead to the conclusion that Respondent began enforcing employees' reporting times because of that lawsuit. Respondent must support its claim with evidence other than its bare assertion that it took the action because a lawsuit was pending. In this regard, Respondent did not present any documentary evidence that its action was motivated by the pending lawsuit. Nonetheless, although Respondent failed to present such evidence during the investigation of the charge, one of the purposes of the hearing is to allow Respondent to raise its affirmative defense again and present any evidence in support thereof to the administrative law judge. Thus, Respondent's unsubstantiated

³ Moreover, Respondent failed to demonstrate why the lawsuit, which it claims to be non-meritorious, would have nonetheless compelled it to change its practice regarding reporting times.

⁴ The lawsuit referred to by Respondent does not relate to employees' reporting times. The lawsuit claims that employees are owed pay for periods when they worked through their meal breaks. Although Respondent carefully sidesteps this issue in its Motion by suggesting that the lawsuit is broader than the specific allegations, the lawsuit involves meal breaks, not reporting times.

claim that the wage and hour lawsuit compelled it to begin enforcing reporting times can be raised as an affirmative defense at the hearing, but it is not a basis for dismissing the Consolidated Complaint.

Respondent Was Fully Apprised of the Allegations of the Charges and Was Not Denied Due Process by the Region's Non-Disclosure of Confidential Witness Statements.

The detail of Respondent's Motion makes it clear that Respondent was fully apprised of the allegations of the charges and submitted its evidence in response. Thus, as discussed above, Respondent presented witness testimony and copies of employee evaluations in response to the allegation that it delayed the evaluations in violation of Section 8(a)(3) of the Act. Respondent's Motion further indicates that it was apprised of both the factual and legal basis for the allegation that it ceased paying periodic wage increases in violation of Section 8(a)(3) of the Act, and Respondent's attorney referred to the applicable case law. Respondent's Motion also demonstrates that it was fully informed of the evidence supporting the allegation that it stopped allowing employees to report to work early.

The only remaining allegations of the Consolidated Complaint are the alleged violations of Section 8(a)(1) of the Act. Respondent was fully informed during the investigation of the alleged unlawful interrogation, threats and statements, as well as the names of its managers and supervisors who were allegedly involved. Nonetheless, Respondent contends that it was denied due process during the investigation because the Region did not provide it with the charging party's Confidential Witness Affidavits submitted to the Region during the investigation. Section 102.118 of the Board's Rules and Regulations prohibits disclosure of Board and General Counsel files without

permission. *Wal-Mart Stores, Inc.*, 339 NLRB 64, 64 (2003). Subsection 102.118(b)(1) provides a specific exception to this prohibition by allowing the release of a witness' statement for the purpose of cross-examination during the course of an unfair labor practice hearing, but only after that witness has testified at the hearing and only insofar as the statement concerns matters about which the witness testified. *Id.* Thus, as established by the Board's Rules and Regulations, Board law and the Supreme Court's ruling in *Jencks*, Respondent has no due process claim to the charging party's Confidential Witness Affidavits prior to the hearing.

The Union's Attorney's Status Before the Board Has No Bearing on the Region's Issuance of the Consolidated Complaint

The Consolidated Complaint was issued by the Region on the allegations found meritorious by the Region after consideration of both parties' testimonial and documentary evidence, independent of the Union's attorney. The General Counsel's case will be presented at the hearing by Counsel for the General Counsel, independent of the Union's attorney. Thus, the status of the Union's attorney before the Board has no bearing on the Consolidated Complaint or the hearing in this matter and is no basis for dismissing the Consolidated Complaint.⁵

Moreover, Respondent cites no authority for its proposition that the unfair labor practice charges filed against Respondent by the Union should be dismissed because a Union attorney, Mr. Jason Rabinowitz, is "not ethically qualified to make charges against the Respondent." Not only is this claim unsupported by the law, it is also unsupported

⁶ Respondent's Motion, page 19.

⁵ The issue regarding whether one of the Union's attorneys, Mr. Jason Rabinowitz, engaged in any misconduct is currently before the Division of Operations-Management.

by the facts. Neither of the instant charges was filed by Mr. Rabinowitz. Both charges were filed by Attorney Zachary Leeds.⁷

Conclusion

Respondent's Motion presents no basis for dismissing the Consolidated

Complaint. The detail of Respondent's Motion itself demonstrates that Respondent was made fully aware of the facts and law upon which the allegations of the Consolidated

Complaint are based and presented its response during the investigation of the charges.

That Respondent continues to dispute the allegations is no basis for dismissing the

Consolidated Complaint. Contrary to Respondent's claim that due process was denied,
due process to all parties requires that the allegations found meritorious by the Region

now be presented to an administrative law judge for decision based upon evidence

properly introduced and received at a hearing. The Region respectfully requests that

Respondent's Motion to Dismiss the Consolidated Complaint be dismissed.

DATED AT Oakland, California this 7th day of December, 2009.

Jennifer E. Benesis

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Region 32

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⁷ The charge in Case 32-CA-24230 was filed on behalf of the Union by Mr. Leeds on November 19, 2008. The charge in Case 32-CA-24326 was filed on behalf of the Union by Mr. Leeds on February 6, 2009.

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Case(s) 32-CA-24230 32-CA-24326

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AUTO TRUCK DRIVERS, LINE DRIVERS, CAR HAULERS, AND HELPERS, LOCAL NO. 70 OF ALAMEDA COUNTY, CALIFORNIA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA

DATE OF MAILING: December 7, 2009

AFFIDAVIT OF SERVICE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE CONSOLIDATED COMPLAINT

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by postpaid mail upon the following persons, addressed to them at the following addresses:

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Les, Heltzer, Executive Secretary 1099 14th Street, N. W., Suite 11610 Washington, DC 20005 E-Filed

Subscribed and sworn to before me this day 7th of December 2009.

DESIGNATED ACENT

NATIONAL LABOR RELATIONS BOARD